

EXHIBIT A

LAW OFFICES OF
MOSCONE, EMBLIDGE & QUADRA, LLP
MILLS TOWER
220 MONTGOMERY STREET, SUITE 2100
SAN FRANCISCO, CALIFORNIA 94104
TELEPHONE: (415) 362-3599 FAX: (415) 362-2006

December 10, 2007

VIA HAND DELIVERY

Mathew Vandall, Esq.
Kauff, McClain & McGuire LLP
One Post Street, Suite 2600
San Francisco, California 94104

Re: Ennix v. Alta Bates Summit Medical Center

Dear Matt:

The purpose of this letter is to meet and confer regarding Defendant's response to Plaintiff's Requests for Production, Set Two. In response to Plaintiff's requests for over sixty categories of documents, Defendant produced only excerpts of one document and amended its Exhibit A to address several of the requests. This is patently insufficient.

In light of Judge Spero's order following the hearing on Friday, this letter seeks further responses regarding only the Summit campus, without waiving the right to seek further responses regarding the Alta Bates campus at a later time.

Request No. 10

This request seeks documents regarding the financial benefit Defendant obtains relating to medical services Dr. Ennix rendered at Summit and Alta Bates. In lieu of providing documents, you suggested a statement that ABSMC invoices patients for hospital services provided in conjunction with physician services. This is not the only kind of financial benefit the Medical Center receives. For example, Dr. Ennix pays annual membership dues to maintain his privileges on the Medical Staff. We would accept your compromise if the statement were revised to make it more specific and to include membership dues and any other type of financial benefit the hospital receives in this regard. We propose the following:

Defendant receives payment from patients and/or insurers or other payment providers for hospital services provided to patients in conjunction with Dr. Ennix's provision of patient care services at the Medical Center. Each physician bills separately for physician services. Dr. Ennix also pays the Medical Center annual Staff Membership dues in the amount of [specify]. [Add any other types of financial benefit the Medical Center receives relating to medical services Plaintiff performs.]

Please confirm whether there are any other categories of financial benefit.

Mr. Vandall
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Requests Nos. 11 through 16

These seek ABSMC bylaws, rules and regulations and related documents. You produced only excerpts of the "Amended and Restated Bylaws of Alta Bates Summit Medical Center," dated June 30, 2002. Please provide the entirety of that document. We will not seek the remaining documents in this category at this time, although we do not waive the right to do so later if necessary.

Requests Nos. 17 through 26 and 44, 45, 61, 63, 64, 69, 71, and 72.

These seek minutes and other documents related to activities of the Surgery Peer Review Committee and Cardiothoracic Peer Review Committee from 1985 to 2006. The purpose of these requests is to elucidate whether these committees have treated Caucasian and non-Caucasian physicians differently in peer reviews with respect to the complications and issues encountered in the ten cases. To many of these requests, Defendant objected based on the use of the term "Investigation," and on privacy and other grounds.

Defendant's repeated objection that Plaintiff is not entitled to any peer review documents, medical charts or minutes based on privacy grounds is plainly meritless given the Protective Order. Nevertheless, in the interest of compromise and to lessen the production burden, we ask that Defendant produce only the following documents in lieu of responding to the specific requests:

1. All minutes of Summit's (a) Surgery Peer Review Committee meetings and (b) Cardiothoracic Peer Review Committee meetings, from 1992 to 2006.
2. All documents documenting the nurse's review of cases that "fell out" for peer review by the Summit Cardiothoracic Peer Review Committee and Surgery Peer Review Committee from 1992 to 2006. Dr. Isenberg testified that, when a case falls out for peer review, the first step of that review ordinarily is a nurse's review; the nurse either determines a case needs no further review, or refers the case to a physician for further review. We are seeking the documents that evidence the nurse's review ("Nurses' Reports") for all cardiothoracic surgeries and all general surgeries from 1992 to 2006. As an alternative to producing all Nurses' Reports for general surgery, we would accept all Nurses Reports for cases that fell out due to death, excessive blood or blood product use, excessive fluid use, prolonged surgical time, retention of foreign objects, or return to surgery.
3. All Quality Management Worksheets prepared for the Summit Cardiothoracic Peer Review Committee and Surgery Peer Review Committee from 1992 to 2006. Here, we are seeking the physician's reports on the cases referred to a physician by a nurse following the nurse's review described in the previous paragraph. It is our understanding that such physician reports are called "Quality Management Worksheets." If this is incorrect, please produce the documents regardless of the correct name. Again,

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as an alternative to producing all Quality Management Worksheets for general surgeries from 1992 to 2006, we would accept all such reports for cases that fell out due to death, excessive blood or blood product use, excessive fluid use, prolonged surgical time, retention of foreign objects, or return to surgery.

Please produce these documents—and all other documents that include **physician-identifying information produced in response to this letter and/or Plaintiff's second document request**—in Attorneys' Eyes Only form, and do not redact physician-identifying information. Please also produce, in Attorneys Eyes Only form, a key identifying the physician names associated with each physician number. This information is critical to determine the race of the physicians at issue. Obviously, patient-identifying information should be redacted in accordance with the Protective Order. Given these protections, Defendant can have no remaining patient or physician privacy concerns regarding this or any other of these document requests.

Requests Nos. 27 through 31 and 47

These requests essentially seek all peer review documents underlying Defendant's Exhibit A and documents relating to other MEC actions. You object on privacy grounds. For the reasons mentioned above, there can be no genuine privacy concerns. Plaintiff has a right to this information and must have it to prove disparate treatment.

We would accept as a compromise all meeting minutes of the Summit MEC, its officers and its subcommittees (including but not limited to ad hoc committees), regarding all the cases included on Defendant's supplemented Exhibit A.

In offering this compromise, we do not waive the right to request the underlying documents at a later date.

Requests Nos. 34 and 35

These requests seek information regarding instances when ABSMC has referred matters to outside peer review. You objected based on privacy grounds, which is baseless for the reasons stated above. Please confirm that all instances of outside peer review at Summit have been disclosed on Exhibit A, or supplement Exhibit A to include any additional instances. Additionally, please confirm that there have been no instances, other than Dr. Ennix's case, where cases were referred to outside peer review after having been cleared of standard of care issues by an internal peer review. If this is not the case, please produce the responsive documents regarding all such cases.

In offering this compromise, we do not waive the right to request the underlying documents at a later date.

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Requests Nos. 36 and 37

These requests seek documents regarding communications and peer review by National Medical Audit. You objected based on privacy grounds and offered to supplement Exhibit A. That is not enough. At issue in this case is the qualifications and objectivity of NMA. Plaintiff alleges that the AHC sent only information critical of Dr. Ennix to the NMA. Dr. Isenberg testified that the NMA was chosen to review Dr. Ennix's cases based on its performance on an earlier peer review. Plaintiff has the right to evaluate those claims by comparison of communications between ABSMC and the NMA, the fairness of the process used, and the NMA's final report for the other peer review at Summit conducted by the NMA.

Accordingly, for the other instance where Summit used the NMA, please provide the communications between Summit and the NMA and the NMA's report on that peer review. As a compromise, we will accept at this time (without waiving the right to seek the underlying documents later) a detailed descriptive list of attachments or supporting documents (such as the medical charts and records of internal peer reviews) in lieu of the actual documents.

Requests Nos. 39 and 40

These requests seek information regarding other ad hoc committees used for peer reviews at Summit. You objected based on privacy grounds. Again, Plaintiff is entitled to this information to determine whether Summit treats physicians of color differently than Caucasian physicians with respect to the ad hoc committee process. In lieu of producing the requested documents, we would accept at this time a chart listing each instance where an ad hoc committee has been used at Summit from 1992 to 2006 (along with a statement that the chart is an exhaustive list of such cases), including all the categories listed in Exhibit A as well as the specialties of the physicians serving on each ad hoc committee. In offering this compromise, we do not waive the right to request the underlying documents at a later date.

Requests Nos. 41 and 42

For clarification, these requests seek information regarding proctoring that was imposed as corrective action only. Please confirm that Exhibit A includes all such proctoring requirements imposed by the MEC. Please produce a chart, similar to Exhibit A, listing all such proctoring requirements and summary suspensions imposed by any individual or committee other than the MEC. "Corrective action" is not meant to include only that imposed by the MEC, but rather to include any proctoring or summary suspension used for corrective purposes (rather than for new staff purposes or commencing additional privileges).

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Requests Nos. 51, 65 and 70

You objected on vagueness grounds to the request for Cardiothoracic Peer Review Committee data. In response to Request No. 65, you stated that Defendant has already produced "all documents relating to the conversion rates from off pump to on pump bypass procedures considered during Plaintiff's peer review," and you made a similar response for No. 70. However, the documents to which you refer do not include raw data. Please produce the source documents with the raw data used to generate the documents to which you refer. Plaintiff needs and is entitled to this raw data in order to evaluate the statistical analyses used to justify the corrective action taken against Dr. Ennix. Your responses to these requests should include (but not be limited to) the source documents containing the raw data underlying the charts or tables found at D 4312, D 1754, D 1968-1872, D 1885, D 1970-1975, D 2068-2069, and D 1901-1903.

Requests Nos. 53 and 68

You objected on privacy grounds to these requests regarding falsification of medical chart information. Your objection has no merit in light of Plaintiff's willingness to accept responsive documents in Attorneys' Eyes Only form. Accordingly, please produce all documents, other than those relating to Dr. Ennix or cases on Exhibit A, relating to allegations that a physician falsified documents, including but not limited to by allegedly back-dating a note or entry, at Summit from 1992 to 2006, or state that there are no such cases.

Request No. 54

This request seeks information regarding when a department chair has requested review by an in-house specialist and then referred a matter to an ad hoc committee. You agreed to supplement Exhibit A in response; however, that response would include only matters that went before the MEC, while the request also seeks information regarding cases that did not go to the MEC. If there are no such cases, please so state. Otherwise, please produce the requested documents or a chart with the same or similar categories as Exhibit A (as appropriate) regarding such instances.

Finally, we have not yet reviewed the supplemented Exhibit A, which we received at the end of the day Friday. This letter does not purport to address any inadequacies in Defendant's supplementation of that document.

Mr. Vandall
December 10, 2007
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Please respond by Wednesday, December 12th.

Sincerely,

MOSCONE, EMBLIDGE & QUADRA, LLP



Rachel J. Sater

EXHIBIT B

Confirmation Report - Memory Send

Time : 12-13-2007 04:13pm
Tel line : 4153622006
Name : MOSCONE EMBLIDGE & QUADRA LLP

Job number : 625
Date : 12-13 04:12pm
To : 4210938
Document pages : 003
Start time : 12-13 04:12pm
End time : 12-13 04:13pm
Pages sent : 003
Status : OK

Job number : 625

*** SEND SUCCESSFUL ***

LAW OFFICES OF
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FACSIMILE COVER SHEET

December 13, 2007
4:13:42 PM

To: Maureen E. McClain

Fax: (415) 421-0938

Company: Kauff, McClain & McGuire LLP

Pages: 3 including cover

From: Omar Lateef for Scott Emblidge

Please contact our office if you did not
receive all of the pages or there is another
problem.

Re: Ennix v. Alta Bates Summit Medical Center CC:

MESSAGE:
Please see attached correspondence.

CONFIDENTIALITY NOTE: This and any accompanying pages contain information from the Law Offices of Moscone, Emblidge & Quadra, LLP which is confidential and privileged. The information is intended for the use of the individual or entity named above. If you are not the intended recipient, then be aware that any disclosure, copying, distribution or use of the accompanying document (or the information contained in it) is prohibited. If you have received this facsimile transmission in error, please notify our offices immediately so that we can arrange for retrieval at no cost to you.

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*Please contact our office if you did not
receive all of the pages or there is another
problem.*

Re: *Ennix v. Alta Bates Summit Medical Center CC:*

MESSAGE:

Please see attached correspondence.

CONFIDENTIALITY NOTE: This and any accompanying pages contain information from the Law Offices of **Moscone, Emblidge & Quadra, LLP** which is confidential and privileged. The information is intended for the use of the individual or entity named above. If you are not the intended recipient, then be aware that any disclosure, copying, distribution or use of the accompanying document (or the information contained in it) is prohibited. If you have received this facsimile transmission in error, please notify our offices immediately so that we can arrange for retrieval at no cost to you.

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December 13, 2007

Via Fax

Maureen E. McClain
Kauff, McClain & McGuire LLP
One Post Street, Suite 2600
San Francisco, California 94104

Re: *Ennix v. Stanten, et al.*

Dear Maureen:

Magistrate Judge Spero's standing order requires that lead trial counsel meet in person to attempt to resolve outstanding discovery issues before seeking the court's assistance. I would like to schedule such a meeting on December 18, 2007, at 9:30 am. Please confirm your availability at your earliest convenience.

The subject of the meet and confer will be ABSMC's refusal to produce documents in response to Plaintiff's Requests for Production, Sets Two and Three. It appears that Defendant's position is that it need not produce anything other than its Exhibit A and documents it produced in its initial disclosures. In response to requests for over 100 categories of documents, Defendant produced only excerpts of one document. We sent a letter to meet and confer regarding Set Two earlier this week, offering significant compromises to the scope of the discovery response and offering to accept many responses in Attorneys' Eyes Only form, in order to address Defendant's privacy concerns. We requested a reply by yesterday, but have received none.

Today, we received Defendant's response to Set Three, which included nothing but objections and references to nonresponsive documents allegedly already produced. Defendant repeatedly objected based on duplication, relevancy, and "interference with physician and patient privacy." None of these objections has merit. Regarding duplication, although some of the requests in Set Three overlap with requests in Set Two, Defendant did not produce documents in response to either request, so a duplication objection is nonsensical. Regarding physician and patient privacy, Plaintiff's offer to accept any documents with physician- or patient-identifying information in Attorneys' Eyes Only form removes any basis for such objections.

Finally, regarding relevancy: this suit claims disparate treatment by the hospital of Dr. Ennix and other physicians of color as compared to Caucasian physicians. ABSMC and the individual physicians who participated in Dr. Ennix's peer review

Ms. McClain
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Page 2

justified the peer review and the procedural irregularities therein by allegations that his cases over a period of time involved certain issues and outcomes that lay outside the norm for the practice. Plaintiff is entitled to the raw source data underlying the tables and charts that the hospital prepared to make its case at the peer review level. Without such raw data, Dr. Ennix cannot possibly test the hospital's statistical analysis or its assertion that Dr. Ennix's record lay outside the norm for his practice. Further, the minutes, nurse's reports and related documents of the Surgical Peer Review Committee, the Cardiothoracic Peer Review Committee and MEC are relevant because they will elucidate whether these committees treated Dr. Ennix's case any differently from a procedural or substantive standpoint than other physicians. Moreover, the hospital has taken the position that the issues allegedly surrounding the four minimally invasive cases could not be explained by the newness of the procedure. Dr. Ennix is entitled to get the records of the first few minimally invasive cases of other doctors as well as later case to test this assertion; the same holds true (for comparisons sake) of the other relatively new procedures for which Plaintiff sought documents.

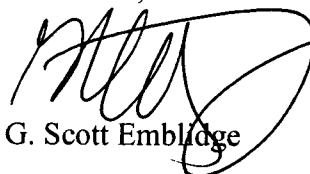
Finally, Defendant's periodic reference to slip opinions from other district courts to support its weak relevance argument is unavailing. The Ninth Circuit has not adopted such a narrow interpretation of "similarly situated." (*See Aragon v. Republic Silver State Disposal*, 292 F.3d 654, 660 (9th Cir. 2002) [citing with approval the Second Circuit's opinion in *McGuinness v. Lincoln Hall*, 263 F.3d 49, 53-54 (2nd Cir.2001) as "explaining [the] minimal showing necessary to establish co-workers were similarly situated."].)

Especially in light of the significant compromises Plaintiff offered regarding responses to Set Two, these are not burdensome requests: the hospital keeps records of the raw data related to outcomes and complications related to cardiac surgery and all other surgery and reports them annually to the state and the STS. Further, the minutes of the committees cannot be hard to locate or burdensome to duplicate and produce. In light of the manifest lack of valid objections and the ease of producing the fundamental information Plaintiff seeks (and has requested in several different forms), the only reason for Defendant's repeated objections and failure to produce any relevant documents appears to be obstruction and interference with the development of Plaintiff's case.

Given the imminence of the holidays and the approaching discovery cut-off, I ask that you respond immediately to schedule a meeting. If the date and time suggested above does not work for you, please suggest other times next week when we are not in or traveling to depositions.

Sincerely,

MOSCONE, EMBLIDGE & QUADRA, LLP



G. Scott Emblidge

EXHIBIT C

KM&M
KAUFF MCCLAIN & MCGUIRE LLP
ATTORNEYS AT LAW
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FAX COVER SHEET

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DATE: December 17, 2007

FILE NUMBER: 10117.0166

To:

NAME	FAX No.	PHONE No.
G. Scott Emblidge, Esq. Moscone, Emblidge & Quadra, LLP	(415) 362-2006	(415) 362-3599

FROM: Matthew P. Vandall, Esq.

RE: Ennix v. Alta Bates Summit Medical Center, et al.

NUMBER OF PAGES WITH COVER PAGE: 5	ORIGINAL WILL NOT FOLLOW
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MESSAGE:

Please see attached.

PLEASE CALL (415) 421-3111 IF FAX TRANSMISSION IS NOT SATISFACTORY.

KM&M
KAUFF M c C L A I N & M c G U I R E L L P

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NEW YORK
SAN FRANCISCO
LOS ANGELES
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December 17, 2007

VIA FACSIMILE

G. Scott Emblidge, Esq.
Rachel J. Sater, Esq.
Moscone, Emblidge & Quadra, LLP
220 Montgomery Street, Suite 2100
San Francisco, CA 94104

Re: **Ennix v. Alta Bates Summit Medical Center**

Dear Scott & Rachel:

I am responding to Plaintiff's December 10 and December 13 letters. Neither letter references the supplemental information contained in Exhibit A which Defendant served on December 6, 2007. Accordingly, it is impossible to tell whether the issues which relate to the chart remain in controversy. Please review that information prior to tomorrow's meet and confer session.

Request No. 10

The proposed compromise is acceptable to Defendant. Defendant is not aware of categories of financial benefit other than payments for hospital services provided to patients in conjunction with Plaintiff's provision of patient care services and the payment of Medical Staff membership dues (made by Plaintiff or on Plaintiff's behalf during the responsive time period).

Request Nos. 11-16

Defendant will search for a complete set of the ABSMC Bylaws dated June 30, 2002.

Documents Underlying Defendant's Exhibit A

Request Nos. 27-31, 47, and 78 seek the documents underlying Defendant's Exhibit A which are highly confidential and protected by substantial privacy rights asserted on behalf of the individual Summit Medical Staff Members. At the November 30, 2007 Discovery Hearing, Judge Spero recognized these confidentiality



G. Scott Emblidge, Esq.
Rachel Sater, Esq.
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and privacy interests and expressed great concern for the potential encroachment upon the peer review process this litigation presents. He also noted that the most protective provisions of the Confidentiality Stipulation and Protective Order should apply. Defendant recognizes, however, that Plaintiff's counsel must be allowed to confirm that the information contained on Exhibit A is accurate. Defendant therefore proposes that certain supporting records be made available (in redacted form) for inspection by Plaintiff's counsel for the purpose of validating the summary information contained on Exhibit A. Once the summary information is confirmed by Plaintiff's counsel, the parties can meet and confer regarding the submission of summary information to the Court as a set of stipulated facts.

Departmental Peer Review Documents

First, Ms. Sater's December 10 letter does not address Defendant's objection concerning the definition of the term "INVESTIGATION" (see Request Nos. 17, 19-22 and 24-26). These requests state that the defined term has the meaning ascribed to it in the June 2006 Bylaws. Under Article VII, Section 7.1(B) of those Bylaws, the term means "an investigation ordered by the Medical Executive Committee, or by the Medical Staff President on its behalf, indicating that a Member has exhibited" certain behavior (also identified in the Bylaws). The term "INVESTIGATION" specifically excludes "the usual activities of departments and other committees of the Medical Staff, including the usual quality assessment and improvement activities undertaken by the Medical Staff . . . or inquiries of the Medical Executive Committee, or its representatives, to determine whether to order an investigation." Id. Thus, the records contemplated by Request Nos. 17, 19-22 and 24-26 constitute documents created in connection with MEC Level "Investigations" of the sort summarized in Exhibit A. To the extent Plaintiff seeks the documents underlying Exhibit A with these Requests, Defendant refers Plaintiff to the compromise proposed in the preceding section. To the extent Plaintiff seeks peer review documents which were not part of an MEC level investigation, the requests are fatally defective.

Second, Defendant's privacy objections to requests seeking documents concerning departmental peer review of physicians practicing at Summit Medical Center (see Request Nos. 17-26, 39-42, 44, 45, 51, 53, 54, 61, 63, 64, 65, 68, 69, 70-72, 75-76 and 78) may not be dismissed merely because there is an Attorney' Eyes Only designation which applicable to third party peer review documents in this case. The records Plaintiff seeks are highly confidential and protected by privacy rights asserted on behalf of the individual Summit Medical Staff Members who were promised (as Plaintiff was) that their peer review would be conducted on a confidential basis and in accordance with California Evidence Code section 1157 as well as the provisions of the Summit Medical Staff Bylaws. The Attorneys' Eyes Only designation imposed upon



G. Scott Emblidge, Esq.
Rachel Sater, Esq.
December 17, 2007
Page 3

Exhibit A by Judge Spero during the November 30 Discovery Hearing serves to protect the confidentiality and privacy interests of those individuals who were provided with actual notice of the potential production of their peer review information. The physicians identified in Exhibit A received such notice and had an opportunity to be heard by the Court. The physicians reviewed generally at the departmental or committee level (e.g., below the MEC Investigation level) did not receive such notice. As you know, the Protective Order requires Counsel to develop a process to advise any Medical Staff member whose peer review, quality or credentialing material could be made part of this lawsuit of such a potential occurrence, so that the affected persons have the option of taking individual steps to protect their interests. See Protective Order, ¶ 7. Compliance with that obligation (given the scope of these Requests) would impose an undue burden upon Defendant by requiring Defendant to locate each potentially affected person for the purposes of providing proper notice under the Protective Order. With respect to the individuals who have already received notice (e.g., the individuals identified in Exhibit A), Defendant believes the compromise identified in the preceding section is sufficient to address Plaintiff's concerns.

Third, the privacy concerns (and concomitant burdens entailed with those concerns) are paramount given the lack of relevance of the documents Plaintiff seeks. Because Plaintiff lacks evidence of discriminatory conduct or comments made by any of the individuals involved in his peer review, he must establish that that a similarly situated Caucasian "directly comparable" to him "in all material respects" was treated more favorably than he was. See Mbadiwe v. Union Mem'l Reg'l Med. Ctr., Inc., 2007 U.S. Dist. LEXIS 30319, *5-*6 (W.D.N.C. Apr. 24, 2007) (applying the "similarly situated" standard to the Section 1981 claim of a minority physician who complained that his hospital privileges were restricted due to his race); see also Vesom, 2006 U.S. Dist. LEXIS 68576, *70-*71 (same within the context of an application for reappointment privileges). In the traditional employment context, the Court would consider two employees "similarly situated" if they "dealt with the same supervisor" and were "subject to the same standards." See Radue v. Kimberly-Clark Corp., 219 F.3d 612, 617-618 (7th Cir. 2000) (noting that "[d]ifferent employment decisions, concerning different employees, made by different supervisors, are seldom sufficiently comparable."); see also Patterson v. Avery Dennison Corp., 281 F.3d 676, 680 (7th Cir. 2002) (rejecting an argument that two employees were similarly situated where they reported to different supervisors, had different levels of experience and different job responsibilities). These opinions provide the appropriate framework for similar situation analysis under Section 1981 given the lack of authority on point in the Ninth Circuit. Thus, the manner in which Caucasian or non-African American physicians were treated at the departmental peer review level over a twenty year time period has no bearing on Plaintiff's Section 1981 claim here because Plaintiff must compare himself with other Summit Medical Staff Members who had similarly alarming performance deficiencies and who were evaluated



G. Scott Emblidge, Esq.
Rachel Sater, Esq.
December 17, 2007
Page 4

by the same set of decision makers. Departmental review which did not rise to the MEC level cannot satisfy these criteria and further discovery in this area will not be provided.

Finally, Defendant will not disclose the identities of any physicians who were peer reviewed by the Summit Medical Staff – whether or not such individuals also appear on Exhibit A – and Defendant disagrees that physician names have any bearing on their race. The Confidentiality Stipulation and Protective Order specifically states that the “identity of the members of Alta Bates’ Medical Staffs in relationship to their having been subject to peer review, quality and/or credentialing processes or proceedings, shall not be provided or utilized in this litigation, but rather the Medical Staff’s members names shall be kept confidential and their identities otherwise designated (e.g., Physician A, Physician B, etc.).” Protective Order, ¶ 7 at pp. 3-4.

Request Nos. 34 & 35

In addition to the foregoing concerns, Defendant refers Plaintiff to the supplemental information produced in Exhibit A on December 6, 2007.

Request Nos. 36 and 37

The inspection referenced above for the documents underlying Exhibit A will include an NMA Report for Physician G which will enable Plaintiff to gauge the objectivity of the outside evaluators as well as the accuracy of Dr. Isenberg’s deposition testimony concerning some of the reasons why NMA was chosen in Plaintiff’s case.

Request Nos. 65 and 70 and the Source Data Requested In Set Three

Defendant is willing to discuss the potential for compromise concerning the provision of summary data regarding certain of the procedures identified in these Requests.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Matthew P. Vandall'. The signature is fluid and cursive, with a long horizontal stroke at the end.

MATTHEW P. VANDALL

EXHIBIT D

1 MAUREEN E. McCLAIN (State Bar No. 062050)
 Email: mcclain@kmm.com
 2 ALEX HERNAEZ (State Bar No. 201441)
 Email: hernaez@kmm.com
 3 MATTHEW P. VANDALL (State Bar No. 196962)
 Email: vandall@kmm.com
 4 KAUFF McClain & McGuire LLP
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 5 San Francisco, California 94104
 Telephone: (415) 421-3111
 6 Facsimile: (415) 421-0938

7 Attorneys for Defendants
 ALTA BATES SUMMIT MEDICAL CENTER,
 8 RUSSELL D. STANTEN, M.D., LEIGH I.G.
 IVERSON, M.D., STEVEN A. STANTEN, M.D.,
 9 WILLIAM M. ISENBERG, M.D., Ph.D.

10 G. SCOTT EMBLIDGE (State Bar No. 121613)
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 14 San Francisco, CA 94104-4238
 Telephone: (415) 362-3599
 15 Facsimile: (415) 362-2006

16 Attorneys for Plaintiff
 COYNESS L. ENNIX, JR., M.D.

17
 18 UNITED STATES DISTRICT COURT
 19 NORTHERN DISTRICT OF CALIFORNIA

20 COYNESS L. ENNIX, JR., M.D., as an
 21 individual and in his representative capacity
 under Business & Professions Code Section
 17200 et seq.,
 22

23 Plaintiff,

24 v.

25 RUSSELL D. STANTEN, M.D., LEIGH I.G.
 26 IVERSON, M.D., STEVEN A. STANTEN,
 M.D., WILLIAM M. ISENBERG, M.D.,
 27 Ph.D., ALTA BATES SUMMIT MEDICAL
 CENTER and does 1 through 100,

28 Defendants.

CASE NO. C 07-2486 WHA

**CONFIDENTIALITY
 STIPULATION AND [PROPOSED]
 PROTECTIVE ORDER**

JUDGE: Hon. William H. Alsup

COMPLAINT FILED: May 9, 2007
TRIAL DATE: None set

1 WHEREAS, on April 3, 2007, Plaintiff Coyness L. Ennix, M.D. ("Plaintiff")
2 commenced an action in the Superior Court of California for the County of Alameda
3 entitled *Coyness L. Ennix, Jr., M.D., as an individual and in his representative capacity*
4 *under Business & Professions Code § 17200 et seq. v. Russell D. Stanten, M.D., Leigh*
5 *I.G. Iverson, M.D., William M. Isenberg, M.D., Ph.D., Alta Bates Summit Medical Center*
6 *and does 1 through 100* (Case No. RG 07318658) (the "State Court Action");

7 WHEREAS, on May 9, 2007, Plaintiff commenced the above-entitled action
8 in the United States District Court for the Northern District of California;

9 WHEREAS, on May 10, 2007, Plaintiff voluntarily dismissed the State
10 Court Action without prejudice;

11 WHEREAS, Defendants Alta Bates Summit Medical Center ("Alta Bates");
12 Leigh I.G. Iverson, M.D.; Russell D. Stanten, M.D.; Steven A. Stanten, M.D.; and William
13 M. Isenberg, M.D., Ph.D., (collectively, "Defendants") intend to respond to the Complaint
14 within the time period allowed by law;

15 WHEREAS, the parties will be exchanging discovery materials throughout
16 this litigation through their initial disclosures and pursuant to their respective discovery
17 requests in this action; and

18 WHEREAS, the parties have agreed that Plaintiff will be deposed on May
19 25 and May 26, 2007 pursuant to a deposition notice served in the State Court Action, at
20 which time confidential discovery materials may be exchanged, and

21 WHEREAS, the parties' discovery materials may contain information of a
22 personal, confidential, or proprietary nature or which may be otherwise protected from
23 disclosure by public policy, third-party privacy or confidentiality interests, or state and/or
24 federal law;

25 IT IS THEREFORE STIPULATED that:

26 1. This Confidentiality Stipulation and Protective Order ("Stipulated
27 Protective Order") shall govern the production and disclosure of information through the
28 discovery and pretrial processes. This Stipulated Protective Order is not intended to

1 govern at trial. The parties will cooperate in establishing procedures acceptable to the
2 Court with respect to the protection of information designated as "CONFIDENTIAL" or
3 "ATTORNEYS' EYES ONLY" pursuant to this Stipulated Protective Order at any trial and
4 upon any appeal of this case.

5 2. For purposes of this Stipulated Protective Order, "Discovery
6 Materials" shall include documents, responses to FRCP Rule 33 and Rule 34 requests,
7 deposition testimony, and all other information that may be disclosed by the parties in
8 the course of discovery in this action, as well as compilations or excerpts of such
9 materials. "Discovery Materials" shall also include any documents or information, as well
10 as compilations or excerpts of such materials, which either party seeks to file with the
11 Court regardless of whether such documents or information are the subject of a pending
12 discovery request.

13 3. The parties anticipate there will be significant discovery disputes
14 regarding the production of documents and information concerning the record of peer
15 review, quality or credentialing processes or proceedings of Alta Bates or of its Medical
16 Staffs, or of incident or other reports leading to such peer review, quality or credentialing
17 processes or proceedings. This Stipulated Protective Order does not concede, abrogate
18 or diminish, and shall not be construed to concede, abrogate or diminish, the application
19 of California Evidence Code section 1157 ("Section 1157") to discovery concerning the
20 peer review, quality or credentialing processes or proceedings and records of Alta Bates
21 or of its Medical Staffs. Nor shall this Stipulated Protective Order operate as a waiver of
22 either party's right to contest the application of Section 1157 in this litigation. This
23 Stipulated Protective Order shall not abrogate or diminish any other privilege, or any
24 contractual, statutory or other legal obligation or right of any individual with respect to
25 Discovery Materials.

26 4. Any party may identify Discovery Materials it deems to be entitled to
27 protection under this Stipulated Protective Order by designating such Discovery
28 Materials as "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY". Any such designation

1 shall be made in good faith and Discovery Materials so designated shall be marked
2 "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY".

3 5. In the event that a party makes documents available for inspection
4 rather than delivering copies to another party, no marking need be made in advance of
5 the initial inspection. However, the counsel producing the documents shall notify the
6 inspecting counsel of the documents which the producing party considers either
7 "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY", and the inspecting counsel shall
8 respect such designation pending production and marking of the documents.
9 Deposition transcript pages may be designated "CONFIDENTIAL" within two weeks of
10 receipt of the transcript, and shall be deemed to have been designated
11 "CONFIDENTIAL" in their entirety until those two weeks have elapsed. Testimony may
12 also be designated on the record of any deposition as "CONFIDENTIAL."

13 6. Unless a patient agrees otherwise, any patient-identifying
14 information (as defined by state and federal law) shall be fully redacted from all written
15 material produced or filed in this case. In addition, the parties and their counsel agree to
16 employ their best efforts to avoid disclosing any patient-identifying information in
17 testimonial form and that, to the extent feasible, any inadvertent disclosures of patient-
18 identifying information made in testimonial form shall be stricken from the record as soon
19 as is reasonably practical.

20 7. Defendants do not believe that documents and information
21 concerning the peer review, quality and/or credentialing processes or proceedings of the
22 members of the Alta Bates' Medical Staffs will be subject to discovery in this action. If,
23 however, the Court orders Defendants to produce such Discovery Materials or the
24 parties stipulate to their production, in whole or in part, then the procedures described
25 herein shall apply. The identity of the members of Alta Bates' Medical Staffs in
26 relationship to their having been subject to peer review, quality and/or credentialing
27 processes or proceedings, shall not be provided or utilized in this litigation, but rather the
28 Medical Staffs' members names shall be kept confidential and their identities otherwise

1 designated (e.g., Physician A, Physician B, etc.). Counsel shall develop a process to
2 advise any Medical Staff member whose peer review, quality or credentialing material
3 could be made part of this lawsuit of such a potential occurrence, so that such affected
4 persons have the option of taking individual steps to protect their privacy interests.
5 Notwithstanding the foregoing, Plaintiff does not waive his right to seek discovery at a
6 later time of the identity of the members of Alta Bates' Medical Staffs in relationship to
7 their having been subject to peer review, quality and/or credentialing processes or
8 proceedings. This paragraph does not apply to the identification of Plaintiff who has
9 already made such identification public. Except for the individuals identified in the
10 Complaint (whose names shall not be designated as "CONFIDENTIAL") and insofar as
11 the information is discoverable at all, the names of the members of the Alta Bates'
12 Medical Staffs who participated in Plaintiff's peer review, quality and/or credentialing
13 processes or proceedings shall be provided by name, however, those names shall be
14 designated as "CONFIDENTIAL" under the terms of this Stipulated Protective Order.

15 8. Access to Discovery Materials designated "CONFIDENTIAL" shall
16 be restricted in accordance with the following provisions:

17 (a) "CONFIDENTIAL" Discovery Materials means information
18 (other than either "ATTORNEYS' EYES ONLY" designated information or information the
19 confidentiality of which has not been maintained) designated by a party as
20 CONFIDENTIAL and which contains, among other things: (1) non-public, proprietary
21 and/or trade secret information; (2) confidential personnel file information about current
22 or former Alta Bates employees; (3) confidential private information about members of
23 the Medical Staffs, including allied health professionals; (4) incident or other reports
24 leading to or constituting the peer review, quality or credentialing processes or
25 proceedings; (5) written records and information obtained from any source, reviewed, or
26 generated relative to, during or immediately after proceedings, investigations or
27 meetings of an Ad Hoc Committee, the Medical Executive Committee and/or the Medical
28 Executive Board (the "MEC") or any other committee of the Medical Staffs regarding the

1 peer review, quality or credentialing of the Medical Staffs' members as well as verbal
2 statements or testimony describing or recounting those Medical Staffs' committee
3 proceedings, investigations or meetings; (6) information about or concerning a current or
4 former member (including applicants for membership) of the Medical Staffs which was
5 submitted, collected, or prepared by any agent or representative of Alta Bates, any other
6 health care facility, any medical practitioner or any organization of the Medical Staffs for
7 the purpose of achieving and maintaining quality patient care, reducing morbidity and
8 mortality, or contributing to clinical research.

9 (b) "CONFIDENTIAL" Discovery Materials and all information
10 extracted from "CONFIDENTIAL" Discovery Materials shall be used solely for the
11 purposes of prosecuting or defending this action, and for no other purpose.

12 (c) "CONFIDENTIAL" Discovery Materials produced pursuant to
13 this Order may be disclosed and made available only to the parties' counsel (and their
14 staffs); to Plaintiff; to any officer, director, employee or representative of Alta Bates
15 necessary to aid in the prosecution, defense or settlement of this action; to any trier of
16 fact or law (and their administrative staffs) in this proceeding, and to any mediator
17 relative to a mediation session governed by the mediation privilege (as described in
18 California Evidence Code §§ 1115-1128). Any and all further disclosure of
19 "CONFIDENTIAL" Discovery Materials shall be governed by the provisions of
20 subparagraphs (d)-(h) and paragraphs 9-11, below.

21 (d) No copies, extracts or summaries of any "CONFIDENTIAL"
22 Discovery Materials produced by another party shall be made except by or on behalf of
23 the parties' counsel; and such copies, extracts or summaries shall also be designated
24 and treated as "CONFIDENTIAL" Discovery Materials and shall not be delivered or
25 exhibited to any persons except as provided in this Stipulated Protective Order.

26 (e) All persons who are permissibly shown "CONFIDENTIAL"
27 Discovery Materials shall be advised of the confidentiality of such material, and certain
28

1 such persons as specified below, shall sign a copy of Exhibit A acknowledging their
2 confidentiality obligations.

3 (f) Counsel may allow access to "CONFIDENTIAL" Discovery
4 Materials produced by another party to consultants (and their staffs), including
5 consultants designated to testify as expert witnesses, provided that any such consultant
6 shall first be provided with a copy of this Stipulated Protective Order and shall execute
7 an undertaking in the form annexed hereto as Exhibit A. Consultants are hereby
8 specifically advised that their written work product which contains or discloses the
9 substance of "CONFIDENTIAL" Discovery Materials is subject to all the provisions of this
10 Stipulated Protective Order. Counsel disclosing "CONFIDENTIAL" Discovery Materials
11 to consultants shall be responsible for obtaining the executed undertaking in advance of
12 such disclosure and also shall retain the original executed copy of said undertaking.

13 (g) During depositions, Counsel may question any witness about
14 "CONFIDENTIAL" Discovery Materials. Any "CONFIDENTIAL" document so referred to
15 may be marked as an exhibit, but no such "CONFIDENTIAL" document, or any portion
16 thereof, shall be attached to any publicly-available deposition or other transcript without
17 the written consent of the party that designated the document as "CONFIDENTIAL."
18 Portions of deposition transcripts designated "CONFIDENTIAL" shall be so marked.
19 "CONFIDENTIAL" portions, including exhibits consisting of "CONFIDENTIAL"
20 documents, shall be bound under seal separately from the non-confidential portions of
21 the transcript.

22 (h) "CONFIDENTIAL" Discovery Materials shall be deemed
23 "sealable" in accordance with the provisions of Civil Local Rule 79-5, which provisions
24 shall apply to any presentation of "CONFIDENTIAL" Discovery Materials, or any
25 references thereto, relative to any submission to the Court.

26 9. Access to Discovery Materials designated "ATTORNEYS' EYES
27 ONLY" shall be restricted in accordance with the following provisions:

28

1 (a) "ATTORNEYS' EYES ONLY" shall mean information (other
2 than information either the confidentiality of which has not been maintained or which
3 qualifies for "CONFIDENTIAL" treatment only), which falls within the categories
4 delineated in (1) through (6) of paragraph 8(a) above and refers to or describes the peer
5 review, quality or credentialing processes of members of the Alta Bates Medical Staffs,
6 other than Plaintiff. Documents and information may only be designated "ATTORNEYS'
7 EYES ONLY" after following the procedures described in subparagraph (b).

8 (b) The parties agree to meet and confer with each other prior to
9 the designation of any documents or information as "ATTORNEYS' EYES ONLY"
10 pursuant to this Stipulated Protective Order. Before producing the documents or
11 information, the designating party shall contact the receiving party and describe
12 generally the documents or information it seeks to designate as "ATTORNEYS' EYES
13 ONLY". The parties will meet and confer in good faith concerning the designation of
14 documents or information as "ATTORNEYS' EYES ONLY" and such meet and confer
15 shall last no longer than 5 court days. If the parties agree, the documents or information
16 may be designated and treated as "ATTORNEYS EYES' ONLY" documents or
17 information under this Stipulated Protective Order. If the parties disagree, the
18 designating party shall file a motion for protective order concerning the designation
19 dispute and the court will determine whether the documents or information at issue
20 warrant heightened protection. Such motion shall be filed within 5 court days of the
21 completion of the meet and confer process described herein.

22 (c) "ATTORNEYS' EYES ONLY" Discovery Materials and any
23 information summarized or extracted therefrom shall be used solely for the purposes of
24 prosecuting or defending this action, and for no other purpose.

25 (d) "ATTORNEYS' EYES ONLY" Discovery Materials shall be
26 disclosed only to counsel for the parties (including their staffs), and to consultants (and
27 their staffs), including consultants designated to testify as expert witnesses who execute
28 Exhibit A. Insofar as "ATTORNEYS' EYES ONLY" Discovery Materials constitute

1 documents or information concerning the record of peer review, quality or credentialing
2 processes or proceedings of Alta Bates or of its Medical Staffs, or of incident or other
3 reports leading to such peer review, quality or credentialing processes or proceedings,
4 such "ATTORNEYS' EYES ONLY" Discovery Materials may also be disclosed to
5 witnesses who participated in the peer review, quality or credentialing processes or
6 proceedings that are the subject of said Discovery Materials and who also execute
7 Exhibit A. Insofar as such consultants or witnesses refer to or rely upon documents or
8 information protected from disclosure by Section 1157, their testimony, declarations and
9 reports also will be protected from disclosure in this action. Plaintiff makes no
10 concessions concerning the application of Section 1157 to protect documents or
11 information from disclosures in this action.

12 (e) No copies, extracts or summaries of any "ATTORNEYS'
13 EYES ONLY" Discovery Materials produced by another party shall be made except by or
14 on behalf of the parties' counsel; and such copies, extracts or summaries shall also be
15 designated and treated as "ATTORNEYS' EYES ONLY" Discovery Materials and shall
16 not be delivered or exhibited to any persons except as provided in this Stipulated
17 Protective Order.

18 (f) "ATTORNEYS' EYES ONLY" Discovery Materials shall be
19 deemed "sealable" in accordance with the provisions of Civil Local Rule 79-5, which
20 provisions shall apply to any presentation of "CONFIDENTIAL" Discovery Materials, or
21 any references thereto, relative to any submission to the Court.

22 10. The disclosure of any Discovery Materials pursuant to the terms of
23 this Stipulated Protective Order is not intended to be and shall not be construed as a
24 waiver of any right or a relinquishment of any confidentiality or privilege claim as to said
25 Discovery Materials or as a waiver of any claim that the information disclosed is a trade
26 secret or is proprietary.

27 11. If any dispute arises concerning whether documents or information
28 designated as "CONFIDENTIAL" should in fact be considered "CONFIDENTIAL" for

1 purposes of this Stipulated Protective Order, then the parties shall try first to resolve
2 such dispute in good faith on an informal basis. The receiving party shall initiate a meet
3 and confer teleconference within ten (10) calendar days of the date the Discovery
4 Materials were served by the producing party. The parties shall complete their meet and
5 confer discussions within five (5) calendar days and no longer. If the parties disagree,
6 the designating party shall file a motion for protective order concerning the designation
7 dispute and the court will determine whether the documents or information at issue
8 warrant protection under the terms of this Stipulated Protective Order.

9 12. Upon final resolution of this litigation, including any appellate
10 proceedings or expiration of the time allowed for appeal, counsel for each party shall
11 return all Discovery Materials marked "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY"
12 received hereunder, including all copies thereof, to counsel for the party that produced
13 said materials. Such returned materials shall include any such "CONFIDENTIAL" or
14 "ATTORNEYS' EYES ONLY" documents in the possession of consultants retained by
15 that counsel. Such return shall occur within 30 days of dismissal or final resolution of the
16 action. Counsel shall be permitted to retain for their work product and privileged files
17 (i) copies of all papers and documents filed with the Court, and (ii) their work product,
18 such as pleadings, correspondence, and memoranda, which contain or refer to
19 "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY" Discovery Materials.

20 13. Nothing contained in this Stipulated Protective Order shall preclude
21 any party from seeking or obtaining, upon an appropriate showing, additional protection
22 with respect to any documents, information, or other Discovery Materials. Nothing
23 contained herein relieves any party of its obligation to respond to discovery properly
24 initiated pursuant to the Discovery Order.

25 14. The Court may modify this Stipulated Protective Order at any time or
26 consider any dispute which may arise hereunder upon motion of any of the parties.
27
28

1 15. This Stipulated Protective Order shall remain in effect for the
2 duration of the action unless terminated by stipulation or pursuant to Court order. The
3 Stipulated Protective Order shall survive the final termination of this action, and the Court
4 shall retain jurisdiction to enforce, construe or modify its terms.

5
6 **I HEREBY ATTEST THAT THE CONTENT OF THIS DOCUMENT IS ACCEPTABLE
TO ALL PERSONS REQUIRED TO SIGN THIS DOCUMENT.**

7 DATED: May 23, 2007

KAUFF McCLAIN & McGUIRE LLP

8
9 By: /S/ Matthew P. Vandall

10 MAUREEN E. McCLAIN
11 ALEX HERNAEZ
MATTHEW P. VANDALL

12 Attorneys for Defendants
13 ALTA BATES SUMMIT MEDICAL
14 CENTER; RUSSELL D. STANTEN, M.D.;
LEIGH I.G. IVERSON, M.D., STEVEN A.
STANTEN, M.D.; and WILLIAM M.
ISENBERG, M.D. Ph.D.

15
16 DATED: May 23, 2007

MOSCONE, EMBLIDGE & QUADRA, LLP

17
18 By: /S/ Rachel J. Sater

19 G. SCOTT EMBLIDGE
RACHEL J. SATER
ANDREW SWEET

20 Attorneys for Plaintiff
21 COYNESS L. ENNIX, JR., M.D.

22 **IT IS SO ORDERED.**

23 DATED: _____, 2007

24
25
26 _____
United States District Court Judge

EXHIBIT A

EXHIBIT A**AGREEMENT TO BE BOUND BY THE
CONFIDENTIALITY STIPULATION AND PROTECTIVE ORDER**

The undersigned hereby acknowledges that he or she has read the Confidentiality Stipulation and Protective Order entered into on behalf of the parties to *Coyness L. Ennix Jr., M.D. v. Leigh I.G. Iverson, M.D., Russell D. Stanten, M.D., Steven A. Stanten, M.D., William M. Isenberg, M.D., Ph.D., Alta Bates Summit Medical Center, and does 1 through 100*, Case No. C 07-2486 WHA, filed in the United States District Court for the Northern District of California; that he or she understands the provisions prohibiting the disclosure of confidential information for any purpose or in any manner not connected with the prosecution or defense of this action; and that he or she agrees to be bound by all provisions of that order. The undersigned further agrees that when he/she is notified that this lawsuit has been finally concluded, the undersigned is obliged to return to the counsel who produced the documents to him/her any "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY" Discovery Materials in his/her possession so that such counsel may return all such documents to the producing party.

DATED: _____

Signature

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